In the

Supreme Court

for the

State of North Dakota

Supreme Court No. 2005-0047

Cass Co. No. 09-03-K-01805

State of North Dakota,

Plaintiff/Appellee,

vs.

Luis I. Hernandez

Defendant/Appellant.

Appeal From Order of the Trial Court Denying Motion for New Trial, dated January 28, 2005 and Criminal Judgment and Commitment, dated January 28, 2005.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant was charged in a single count criminal information filed by the Cass County States Attorney's office as a result of an incident alleged to have occurred on or about May 22, 2003 in the City of Fargo, Cass County, North Dakota. The information alleged the following violations:

> Count 1: **GROSS SEXUAL IMPOSITION** in violation of Section 12,1-20-03, N.D.C.C. in that on or about May 22, 2003, the above-named defendant, on one or more occasions, engaged in a sexual act with another, or caused another to engage in a sexual act, and the victim was less then 15 years old, to-wit: that on or about the above-stated dated, the defendant, **LUIS IGNACIO HERNANDEZ, SR.,** on one or more occasions, between the penis of the defendant and the vulva of L.K.H., dob 05/29/90, said acts occurring in Fargo, Cass County, North Dakota.

Appellant made certain motions ***in limine*** to prevent the use of certain evidence obtained during the execution of search warrants, opinion evidence of a handwriting expert, and evidence of prior sexual contact between the Appellant and the victim. The Honorable Georgia Dawson, District Judge, entered an Order on November 2, 2004, just prior to the commencement of the trial, granting the motion to prohibit evidence of prior sexual conduct and denying the request to prevent the handwriting expert from testifying and from introducing evidence obtained as a result of a search warrant for the person of the Appellant.

The case then proceeded to trial and was tried to a jury from

November 2 through November 8, 2004 and the jury, after receiving the evidence and deliberating on the evidence, returned a verdict of guilty.

Appellant's motion for a new trial was denied. Thereafter the Appellant filed his appeal with this Court.

STATEMENT OF FACTS

Luis I. Hernandez was convicted of gross sexual imposition with the daughter of his former girlfriend. The incident allegedly happened at Motel 6 in Fargo in the late afternoon on May 22, 2003.[1] (T. Pp. 118). The alleged victim said she reported the incident to her mother, Jennifer Haroldson. (T. Pp. 124-125).

Jennifer Haroldson, who is about twelve years older than Hernandez, and the accused had an episodic relationship for about ten years from the time Hernandez was 16 years old. (T. Pp. 689). They had a child together, in 1994, Luis Jr. (T. Pp. 105).

Hernandez also had a relationship with Evon Ortiz. Together they have three children. (T.Pp. 666).

At the time of the alleged incident in May, 2003, Hernandez was wearing a halo device as he recovered from a spinal cord injury, stemming from a one car rollover accident the previous February. (T. Pp. 697-698). Jennifer Haroldson was in the vehicle at the time of the accident. After the accident, Evon Ortiz and Hernandez lived together, with Ortiz taking care of Hernandez, who could not feed or dress himself, could not drive a car, had

[1] Transcript references throughout this brief will be noted T followed by a page number, thus: (T. Pp.).

difficulty walking, had a cast on one arm, could not have sexual relations, and who could not grasp a glass of water with either hand. (T. Pp. 598-599, 601, 644, 670-675, 700-703, 710).

Jennifer Haroldson saw Hernandez off and on after Hernandez was released from MeritCare Hospital. (T. Pp. 107). Since they did not live together, Haroldson or Hernandez would generally rent a motel room so that L.H. and Luis Jr. could use the swimming pool. The meetings at Fargo area motels were about the only times that Hernandez could see his son. (T. Pp. 107-109, 184, 243). However, it developed that Jennifer Haroldson rented motel rooms at least twice in October, 2003, to have sex with Hernandez, and to give him money. (T. Pp. 110, 156-159, 161-163, 165-166, 201-202, 652). Haroldson withheld divulging those assignations from the police when she was interviewed initially. (T. Pp. 197-198, 422-423). Both Jennifer Haroldson and Evon Ortiz held one another in low regard, but Jennifer Haroldson was more outspoken in her disdain for Ortiz. (T. Pp. 179, 603-604, 613, 618, 621, 636, 640, 668. In her fury over the Hernandez-Ortiz relationship, Haroldson had Evon Ortiz arrested Jennifer Haroldson considered Hernandez her husband, although they were unmarried. (T. Pp. 180, 668). Haroldson expressed her views openly to any and all within earshot. (T. Pp. 640, 655).

The defense established that on May 22, 2003, Hernandez, who was being driven by his friend John Tangen, encountered Jennifer Haroldson as they were driving in separate vehicles. (T. Pp. 647-649, 705-706). Haroldson told Hernandez to meet her later that afternoon about 5 p.m. at Motel 6 in Fargo to see his son and L.H.. (T. Pp. 708-710).

At the appointed time, John Tangen drove Hernandez to Motel 6, and as they pulled up, Jennifer Haroldson and L.H. met Tangen's vehicle, assisted Hernandez out of the car and L.H. delivered a large plastic bag full of Hernandez's clothing. (T. Pp. 648-649). The clothes remained in Tangen's car, were retrieved and presented as a demonstrative exhibit at the trial.

Tangen drove off after Hernandez was out of the car. (T. Pp. 649, 706-707). Hernandez, Jennifer Haroldson, and L.H. went to room 216. (T. Pp. 707-708). The children went swimming, returned, and showered, using towels from the hotel. The bed in the room was undisturbed. Hernandez testified that he was in the halo that day. The halo is affixed to the skull with stainless steel screws. (T. Pp. 712-713). As usual that day, while the children were swimming, Jennifer demanded sex from Hernandez. (T. Pp. 708-709). When he could not perform, Jennifer Haroldson accused him of letting Evon Ortiz drain him sexually. (T. Pp. 709).

After the children showered and dressed, all four left together in Jennifer Haroldson's vehicle, with Jennifer Haroldson dropping off Hernandez at the apartment of a friend in Fargo. (T. Pp. 710).

The state's witnesses, including Jennifer Haroldson and her daughter, testified that Hernandez, driving alone in a vehicle, picked up L.H after school from Ben Franklin Jr. High School in north Fargo, drove to a friend's apartment and then to Motel 6. (T. Pp. 37-39). The state's witnesses maintained that Hernandez and L.H. were in the motel alone without Jennifer Haroldson or Luis Jr. The state's main witness, L.H., also testified that she went willingly into the motel room, disrobed without being directed to do so, and that Hernandez sexually assaulted her in two episodes or four episodes within one hour. (T. Pp. 43, 50, 275). The alleged victim said she did not cry out, did not try to escape, did not try to use the telephone in the motel room, did not try to alert the desk clerk, did not alert a neighbor while she was in a grocery store, did not try to walk home from the grocery store, but allowed Hernandez to drive her to her mother's trailer home, where she told her mother she had been raped. (T. Pp. 58, 64-65, 68).

The night of the alleged incident, Jennifer Haroldson had her daughter, L.H., examined at MeritCare Clinic in Fargo, where nurses, a doctor, and technicians obtained a partial and incomplete sexual assault kit

for processing by the North Dakota State Crime Lab. (T. Pp. 276, 281-283). The state crime lab's sexual assault kit protocol calls for the attending physician and a specially trained Sexual Assault Nurse Examiner (SANE) to gather potential evidence from the alleged victim's genitalia and body.

The crime lab's protocol calls for the attending physician assisted by the SANE nurse, among other things, to comb the alleged victim's pubic area to obtain samples from the alleged victim's genitalia, samples of her pubic hair and any hair or "debris" that might have transferred to her person from her alleged assailant. (T. Pp. 281, 288-289). There is a specific notation on the sexual assault kit protocol form to include any "debris" collected. "Debris" was collected at MeritCare by the Dr. Jacob, assisted by the SANE nurse. Dr. Jacob testified that it is protocol to take an extra specimen. (T. Pp. 285-286). The extra specimen was taken after the sexual assault kit was completed, Dr. Jacob testified. (T. Pp. 281). However, the other MeritCare physician who testified for the state contradicted Dr. Jacob. Dr. Alonna Norberg testified that there is a place in the sexual assault kit to include "debris" for analysis by the state crime lab. (T. Pp. 348).

The "extra specimen" was taken by Dr. Jacob from the same area as other "debris" was collected. (T. Pp. 285-286). But the attending physician and SANE nurse violated the protocol because the "debris" collected was

not sent to the state crime lab for analysis. (T. Pp. 285-286, 288-289).

The "debris" should have been labeled and sent to the crime lab for DNA analysis. The only so called "debris" found during the sexual assault examination was diverted for testing by a MeritCare lab technician and found to contain non-motile sperm. (T. Pp. 312, 315-316). The state failed to police the sexual assault kit protocol and allowed clinic personnel then destroyed the "debris" sample. (T. Pp. 316). No DNA testing on the "debris" sample was performed and none could be because of its destruction. (T. Pp. 325).

Also at the time of the examination, the state elicited from the attending physician that the alleged victim was tested for sexually transmitted diseases. (T. Pp. 286-288). The STD test was positive for a full-blown case of gonorrhea, for which the victim was treated with antibiotics. The inference left with the jury by the prosecutor was that the alleged victim's gonorrhea was contracted at the time of the alleged assault. On cross examination, the attending physician testified that the incubation period for gonorrhea is five days. (T. Pp. 288). Thus, the state raised the gonorrhea issue, knowing full well that the disease takes time to develop.

Police obtained certain items of alleged evidence from the motel room where the incident was supposed to have taken place. These included

wet bath towels, a bedspread, pillowcases, and some hair samples. Those items at first yielded no DNA evidence after analysis by the state crime lab.

It is noteworthy that the accused was neither interviewed by police at or near the time of the alleged incident nor at any time. Thus, the case involved no confession or oral admissions. Hernandez testified that he traveled to Texas with Evon Ortiz and their children in early June, 2003, and returned to Fargo in early October, 2003. Hernandez was arrested on the instant charge shortly after his return to Fargo.

While Fargo police had Mr. Hernandez in custody, police took him to MeritCare where police served a search warrant for Hernandez's hair and blood samples for DNA testing and comparison purposes. Police gave Hernandez a copy of the search warrant. (T. Pp. 417-418). The police later wrote "void" on the original search warrant, which the defense did not learn about until weeks later. (The pretrial hearing transcripts have been requested). Police testified that Hernandez was given a copy of the self-same document without the word "void" on it and the word "void" was written on the search warrant after Hernandez got his copy. The copy provided to the defense in discovery bore the word "void" across it. At the time of the search, Hernandez was unaware that MeritCare medical personnel demanded that the police produce an order signed by a judge

before the bodily samples were collected. (T. Pp. 417-418). However, Hernandez believed the warrant was valid and that he had to comply. Police maintained that they obtained an order as a supplement to the original search warrant from another judge sometime later. (T. Pp. 417-418). The supplemental order was obtained without a sworn affidavit in support and the supplemental order was never displayed or given to the accused.

Mr. Hernandez was held in custody from approximately early October, 2003, until his trial in November, 2004. During that time, in an effort to bolster its case, the state said it obtained a hand written letter from Jennifer Haroldson, which purported to be from Mr. Hernandez. (T. Pp. 113, 495).

Haroldson said she found the letter, which was written in Tex-Mex Spanish, when she discovered it stuck in her screen door sometime in October, 2003. (T. Pp. 112-113).

Since Mr. Hernandez was in the Cass County Jail, it remained an unsolved mystery how the letter was delivered since the letter gave no hint other hint of where it originated or how it was delivered. Haroldson said she turned over the letter to police. (T. Pp. 99-100). The state decided to try to use the letter against Mr. Hernandez, although authentication was lacking

and the letter was not examined for useable fingerprints. The state relied on a self-styled handwriting analyst to authenticate the letter as being written by Mr. Hernandez. (T. Pp. 497). Further, the state's handwriting analyst used unauthenticated "known" samples alleged to have been written by Hernandez for comparison purposes. (T. Pp. 497).

The trial judge permitted the "expert" to testify to an opinion that Hernandez wrote all of the known samples and the mysterious letter in Spanish. During a pretrial hearing, the trial judge was presented evidence that a Cass County Jail officer wrote one of the so-called "known" samples and an inmate testified that he wrote most of the remaining "known" samples.[2] (T. Pp. 622-625). Hernandez's spinal cord injury left him incapable of writing anything but his scrawled signature and Hernandez asked others to take dictation from him. (T. Pp. 622-625).

During the trial, the state elicited testimony from medical personnel from MeritCare, concerning an alleged history of prior sexual activity between Hernandez and L.H.. The state, despite a ruling by the trial judge barring such alleged prior bad acts testimony, injected into the trial record prior bad acts allegedly committed by Hernandez. The prosecutor questioned two physicians concerning the alleged victim's gonorrhea

[2] Transcripts of the pretrial hearings were unavailable as this brief was being prepared. The transcripts have been requested.

infection, leaving the implication with the jury that L.H. developed gonorrhea in a matter of hours on May 22, 2003.

On cross examination, defense counsel tried to balance that implication by testimony from the physician that the incubation period for gonorrhea is at least five days, not a matter of a few hours. (T. P. 288). The trial judge denied several defense motions for a mistrial but approved the prosecutor's efforts to elicit uncharged prior bad acts testimony from the physicians. (T. Pp. 297-301, Appendix Pp. 92-96, T. Pp. 330-336, Appendix, 998-104).

In keeping with her ruling that prior bad acts references should not be put before the jury, the trial judge ordered redactions on some of the documents used by the handwriting analyst. Those portions redacted concerned alleged past sexual history between the accused and the alleged victim because it was prejudicial uncharged conduct. The state controlled the redactions. The state failed to redact the English translation (Exhibit 41) of the Spanish language letter (Exhibit 36), exposing the deliberating jurors to a series of alleged admissions by Hernandez concerning uncharged prior conduct.

The trial judge denied motions for a new trial and the accused was sentenced to serve 12 years in prison. This appeal followed.

STATEMENT OF THE ISSUES

I. Trial errors involving alleged uncharged misconduct so infected the trial of the case that the accused was subjected to defending against ambiguous, unspecific allegations of prior sexual abuse of the alleged victim for seven years.

II. Fatal prejudice occurred when extraneous, unredacted material containing references to uncharged conduct contaminated jury deliberations.

III. The trial court erred by permitting a junk science expert to testify without properly exercising any gate keeping functions as required by *Daubert* and *Kumho Tire* decisions of the U.S. Supreme Court, which resulted in giving the prosecution an unfair and highly prejudicial advantage and denied the accused a fair trial.

IV. The trial court erred prejudicially when she permitted the state to present evidence that could not be tested or challenged because the evidence sample was destroyed before it could be analyzed by the defense as potentially exculpatory evidence.

V. Execution of the search warrant for bodily fluid and tissue samples from Hernandez was fatally defective.

ARGUMENT

I. Trial errors involving alleged uncharged misconduct so infected the trial of the case that the accused was subjected to defending against ambiguous, unspecific allegations of prior sexual abuse of the alleged victim for seven years.

The trial judge erred in admitting uncharged misconduct testimony during the trial. Under Rule 404(b) of the Rules of Evidence, the state's Information, the charging document, was limited to alleged sexual abuse on May 22, 2003 and that should have been the extent of the scope of the allegations and the evidence at the trial. The trial court granted a defense motion barring use of the alleged sexual history of the alleged victim. (Docket No. 167, See Appellant's Appendix Pp. 9-10).

However, the state purposely raised the issue by asking the treating physician:

Q. Do you also do any kind of tests for sexually transmitted diseases?

A. Yes.

Q. Did you do that in (this) case?

A. I did that yes.

Q. And what did you find?

A. I tested her for -- the most common sexually transmitted diseases

are gonorrhea and chlamydia. She also tested for HIV and syphilis and herpes. She did come back positive for gonorrhea.

(T. Pp. 286).

To balance the implication, Dr. Jacob was asked on cross examination:

Q. How long after you've been exposed to gonorrhea will it show up in a test?

A. It will take about five days to be infected.

Q. To be infected so that it shows up?

A. Yeah.

(T. Pp. 288).

The state stepped blatantly through the trial judge's bar on presenting prior uncharged conduct by raising the gonorrhea issue. However, the trial judge erred and compounded the issue by permitting the state through Dr. Jacob to go further and "rebut the implication" raised by the defense effort to balance the testimony with the truth. Instead, the state infected the trial with the specter of prior uncharged conduct (T. Pp. 297-307).

When the issue arose midtrial, the defense moved for a mistrial. Instead, the trial judge abused her discretion and erroneously permitted the prosecutor to broad brush the accused with evidence that prejudicially

inflamed the jury and caused the jury to base its verdict on the uncorroborated assertions of the alleged victim repeated to the jury by treating physicians. No curative instruction would have salved the situation and no curative instruction was given.

The risks associated with prejudicial evidence of the nature and scope permitted by the trial court stained the accused irretrievably as surely as a splash of ink cannot be diffused in a glass of milk.

In essence, the trial court tempted and then permitted the jury to penalize the accused based on the repetition of hearsay from the alleged victim. A jury cannot be expected to ignore such powerful but unfair evidence.

Further, there was no way for the defense to answer the alleged crimes that were not currently charged. At the same time, the trial court made clear that the alleged victim was not to be recalled by the prosecution or defense.

Further exacerbating the problem and compounding the error, the trial court a second physician was permitted to testify about medical history reported by the alleged victim. (T. Pp. 330-337, 345). The trial court allowed the state to question the second physician concerning prior sexual history although the trial judge was well aware of the volatility and clear

prejudicial nature of the evidence.

The trial judge recognized the prejudicial impact of the uncharged prior conduct. Outside the jury's presence, the trial judge commented "but for the gonorrhea being inserted into this trial, we might well have been trying the one incident...I find that this evidence is volatile. I mean, it's highly charged stuff." (T. Pp. 333).

The trial court faced a dilemma because the state chose to introduce the issue of gonorrhea on direct examination, not by anything done by the defense. Given the situation, the only choice the defense had was to briefly try to deflect the inference that the gonorrhea was contracted by alleged victim on the day in question. (T. Pp. 288). The state not only elicited the results of the STD test but also continued into the treatment for gonorrhea. (T. Pp. 286-288).

The trial judge, thus, sanctioned the unfair prejudice already suffered by the accused by allowing the prosecutor to elicit more self-reported allegations from the alleged victim as though they were substantiated independently. The trial court allowed indirectly what it had barred in ruling on the defense motion ***in limine.*** The impact on the defense was fundamentally unfair, rendering the entire trial unfair.

Fundamental fairness and the Rules of Evidence foreclose witnesses

such as the alleged victim from vouching for her own testimony through unsubstantiated statements concerning uncharged, alleged misconduct by the accused.

Such testimony amounts to improper bolstering of the alleged victim's reliability and should not have been admitted before the jury. ***See People v. Rios,*** 12 Cal. Rptr 2d 15 (4th Dist. 1991) (when the only prosecution evidence as to the other offenses as well as to the charged offense, is the uncorroborated testimony of the prosecution's alleged victim, the evidence is unfairly prejudicial); ***People v. Kazee***, 121 Cal. Rptr 221 (2nd Dist. 1975). The charged act was on a singular, specific date, May 22, 2003, and any alleged prior sexual abuse, particularly spanning an unsubstantiated seven-year period, should have been excluded.

Further, the alleged victim's testimony is not rendered more trustworthy because a witness cannot buttress her own testimony by making further unsubstantiated allegations. The alleged victim's statements to treating physicians concerning prior uncharged misconduct therefore carry no probative weight and should have been kept from the jury. ***See People v. Stanly,*** 433 P.2d 913 (1967).

Compounding the problem, the defense received no specific notice of the uncharged alleged misconduct as required under the Rules of Evidence.

The failure of notice was raised pretrial by the defense, but the Court granted the defense motion ***in limine*** somewhat blunting the issue until the prosecution breached the ***in limine*** order with physician witnesses, Drs. Jacob and Norberg.

The result was a bell that, once rung, cannot be unrung. The accused suffered irreparable prejudice as a result of the trial judge's errors.

Clearly, the jury succumbed to the syndrome of "he did it before," and found guilt on an improper basis. ***See State v. Newton,*** 743 P.2d 254 (1987). It is expecting the impossible for the fact finder to ignore that a person who is accused of past misconduct with a victim is more likely to do so again.

The trial court erred when it denied numerous defense motions for a mistrial based on the clear, harmful prejudice to the accused. (T. Pp. 297-302, 330-336).

Further, the Court, at a minimum and following routine trial practice, should have had the prosecution proceed by an offer of proof outside the presence of the jury before permitting the state to present alleged victim's self-reported, uncorroborated medical history evidence in broad brush fashion.

Without an offer of proof by the prosecutor, the trial court essentially

was blind to the potential for harmful prejudice from the evidence that the defense sought to protect against; namely, inflammatory material that that could not be quenched by any curative instruction from the Court.

II. Fatal prejudice occurred when extraneous, unredacted material containing references to uncharged conduct contaminated jury deliberations.

Fatal prejudicial error was committed by allowing the jury to have an unredacted copy of the English translation of the Spanish language letter the prosecutor attributed to the accused. See State's Exhibit 41, Docket #217, a copy of which is in Appellant's Appendix at Pp. 33-35.

As a consequence of the erroneous submission of information not properly before the jury, the defendant's right to a fair and impartial trial as guaranteed by the Sixth Amendment of the U.S. Constitution was totally compromised. The error occurred after the evidence was closed. Thus, the accused was forever barred from challenging the allegations contained in State's Exhibit 41.

The submission to the jury of the unredacted letter for the jury's use, which contained inadmissible Rule 404(b) evidence, gave the jury an improper basis for its verdict. The material contained in the unredacted letter was not part of the evidence presented to the jury.

In fact, the Court forbade the state from using evidence of uncharged

misconduct in a pretrial ***in limine*** ruling. Clearly, the unredacted letter created unfair prejudice to the accused, which resulted in a flawed verdict. Permitting such inflammatory evidence to go to the jury had the effect of sinking the accused's ship without a trace. The trial court committed further error in failing to grant the accused a new trial.

The Sixth Amendment requires that the defendant have a fair trial before an impartial jury. Instead, the jury's attention was unfairly focused on alleged uncharged misconduct. The cumulative effect of: 1. permitting two physicians to testify in the state's case in chief concerning an alleged pattern of sexual contact with the alleged victim over a seven year period, 2. permitting the unredacted English translation of a hearsay letter to go to the jury wreaked overwhelming injury to the defense case. The prejudice to Hernandez was fatal.

The accused was denied the right of confrontation because the uncharged misconduct could not be tested through cross-examination. The trial judge made it clear that the alleged victim would not be recalled to testify. (T. Pp. 336). The accused was denied his right to re-cross-examine the alleged victim. Further magnifying the problem, the trial judge failed to ensure procedural safeguards by permitting the jury to receive potentially incriminating evidence in the form of the English translation of a Spanish

letter, which evidence was never intended for the jury's consideration.

Fairness in deliberations is a major component of the right to a fair trial. It is hornbook law that the trial Court is responsible for ensuring fairness in all phases of the trial, including deliberations by the jury. ***See Nebraska Press Assn. v. Stuart***, 427 U.S. 539, 555 (1976).

The deliberations in this case were irretrievably tainted by the submission to the trial jury of the complete copy of the English translation. State's Exhibit 41 was sent to the jury without regard for its contents, which included alleged uncharged misconduct. While other exhibits contained redactions made by the prosecutor, States' Exhibit 41 was unmarked for redaction.

The trial Court permitted the jury to have State's Exhibit 41 despite granting the defense pretrial motion ***in limine*** to bar the state from using prior uncharged misconduct and despite the state's agreement, after a defense sustained objection, that all writings submitted to the jury during its deliberations should be "whited out" or otherwise redacted of references to any prior alleged sexual contact between the accused and the alleged victim. (T. Pp. 767-773).

The criminal information set out only one date, May 22, 2003. State's Exhibit 41 in the jury room created presumptive unfair prejudice

against the accused, injecting what amounted to a fatal dose of poison into the jury's deliberations. The prejudicial impact of the letter is obvious since it makes reference to alleged uncharged misconduct.

Among other things, the jury was improperly permitted to read, review, and consider the following:

> **Do you remember when she went with me before in the red truck and she came back with a smile from ear to ear because that day she was able to get it off twice and she was really happy. If I had raped her she wouldn't have been happy when I left her at the house. She would have been mad and she would have told you that I raped her but I didn't rape her she just put out willingly. She should say that we had sex not that I raped her**. And if they ask you if you want to press charges say no. My lawyer wants me to tell the court that you were seeing me after the charges. And already checked the hotels where we were seeing each other and that you had the yellow car then I gave you the truck because a lot of people saw me in the truck but if I tell them that Child Protection will take the children away from you I don't want that. **You better tell her that it was really voluntary sex not rape and you shouldn't press charges because if you don't do it they want to give me 20 years 15 at least**. And if I say that you were seeing me I could do less and that you were my accomplice they can lock you up too because you didn't call the police on me. I don't want that to happen. Take care of it between you and her. (Emphasis added).

The prejudice to the accused of this document is both explosive and pervasive. Submission of the English translation of the Spanish language letter exposed the jury to evidence that the lawyers and the Court agreed

should not be given to the jury during its deliberations. Redactions of certain exhibits were completed. Unfortunately, State's Exhibit 41 remained in tact, and unredacted, violating the Court's order on uncharged prior conduct under Rule 404(b) of the NDRE and the Sixth Amendment's premise of providing the accused with a fair trial.

The redaction agreement, intended as a safeguard, clearly was breached. The breach caused the jury members to have unauthorized access to highly inflammatory material that was never presented to the jury during the evidence phase of the case. Even an unintentional, negligent breach of the agreement to redact uncharged misconduct would not save or erase the resulting prejudice suffered by the accused. The impact would be the same whether intentional or unintentional. ***See U.S. v. Luffred***, 911 F.2d 1011, 1014 (5th Cir. 1990) (jury's consideration of extrinsic evidence excluded from the trial was not harmless because chart purported to show defendant signed checks in bank fraud), and ***U.S. v. Cunningham,*** 145 F.3d 1385, 1393, 1396 (D.C. Cir. 1998) (inadvertent submission of unredacted 911 calls where eight witnesses not heard at trial on tape was not harmless when government could not show that the 911 tape did not contribute to verdict beyond a reasonable doubt).

This Court has addressed the issue of extraneous material, not

properly before the jury during deliberations, being unfairly influential on the jury and prejudicial to the defendant, requiring a new trial. ***See State v. Lindeman,*** 254 N.W. 276, 278, 280, 281 (1934). In ***State v. Abell***, 383 N.W. 2d. 810 (1986), which involved the jury's use of a dictionary during deliberations.

In that case this Court set out the standard for deciding a new trial motion based on extraneous material in the jury room. The Court said the rule

> is that the prosecution must demonstrate that there is not a reasonable possibility that the jury misconduct could have affected the verdict to the defendant's prejudice...(*citation omitted)*This rule is consistent with the basic premise that a defendant is entitled to a fair and impartial trial and with the prosecution's burden to affirmatively prove every element of the crime charged. 383 N.W.2d at 812.

In ***Abell***, this Court granted a new trial, reversing the trial court's denial of a new trial motion for an abuse of the trial court's discretion, finding that there was a reasonable possibility that the jury's use of a dictionary to define the term "force," since some of the eleven separate definitions might have shared or altered the meaning of gross sexual imposition statute so as to possibly influence the verdict.

In the instant case, the error in permitting the jury to have, review, and consider State's Exhibit 41 was an unfair death blow to the defense.

Once that bell was rung, there is no way to undo the unfair prejudice that resulted.

The impact of State's Exhibit 41 in the jury room is far more insidious and therefore more prejudicial to the accused in a criminal case. The only alternative to these and other errors, in fundamental fairness to the accused, is to grant a new trial.

III. The trial court erred by permitting a junk science expert to testify without properly exercising any gate keeping functions as required by *Daubert* and *Kumho Tire* decisions of the U.S. Supreme Court, which resulted in giving the prosecution an unfair and highly prejudicial advantage and denied the accused a fair trial.

The "expert" lacked qualifications, proficiency, and scientific methodology to analyze the handwriting in this case. Suffice to say that the so-called expert relied on compromised writings that were submitted to him as "known" samples of Mr. Hernandez. Standard operating procedure dictates that there be some scientific validity offered to the Court as the basis for an expert's opinion. None was offered in this case under any test accepted by courts across the country, including ***Frye v. U.S.,*** 293 F. 1013 (D.C. Cir. 1923). Since ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579 (1993), lower courts, including state courts, have adopted a reliability test for determining the admissibility of scientific evidence.

The state hired a retired criminal investigator to perform "handwriting analysis" on a document written in Spanish. The document was neither addressed to anyone, nor was it signed by anyone. See State's Exhibit 9, Docket #184.

Further, the writing apparently was unwitnessed in its preparation. For all practical purposes the questioned document is anonymous.

It is the defense contention that not only is the handwriting "expert" unqualified, but that he based his opinion on samples of writing that were never authenticated as being written by the accused. (T. Pp. 447-453).

Thus, Lybeck's handwriting analysis was flawed from the outset. The analysis was flawed and compromised and the results should have been excluded from evidence. Thus the trial court committed error and abused its discretion in permitting Lybeck to testify.

Exemplar "K 1", which is part of State's Exhibit 37, Docket #213, is a request form used at the Cass County Jail. Deputy Sheriff Laurie Ward testified pretrial and at the trial that she wrote the top portion of the request form. (T. Pp. 430-433). Lybeck relied on the form for his opinion, but at the trial he discarded the form and said his opinion was the same without "K-1." T. Pp. 505-506, 510-512). Lybeck formed his opinion based on his law enforcement background and not because of any alleged expertise. He

admitted he had no forensic science background and a minimal exposure to some of the handwriting investigative skills that are used by investigators to build a case. (T. Pp. 445-453). Lybeck's lack of qualifications was completely overlooked by the trial court.

The state's expert said he relied on all the "K" exemplars which is part of State's Exhibit 37, Docket #213 as being known samples of the defendant's writing. It is self-evident that the trial court knew the state's "expert" relied on at least one exemplar that common sense dictates shows Lybeck's conclusions are questionable and likely invalid.

Furthermore, it was a violation of the defendant's due process rights and the right to confrontation guaranteed by the U.S. Constitution to permit any individual claiming expertise in handwriting analysis to testify in this case.

Despite what the trial court's acceptance level of handwriting analysis may have been, this Court should not simply accept her conclusion. Handwriting analysis is not founded in science, there is no known validity testing, no standards, no certification program, no reported rate of errors. In short, handwriting analysis expertise cannot be measured.

As even Lybeck testified, the results in a given analysis are determined solely by the analyst using subjective, untested methods. (T. Pp.

447-453). That Mr. Lybeck was given the task of drawing a conclusion enhances the suggestiveness of the whole endeavor: he looked for consistencies and made an identification. But if the consistencies are based on invalid writing samples, what level of confidence can this Court put on Mr. Lybeck's opinion.

Fundamental fairness requires that the proffered expert work from authenticated, known samples of the accused's handwriting. The state's handwriting witness was not working with authentic samples as Deputy Ward testified concerning "K 1," a sample of writing done by a law enforcement agent, and Kelly Barfield testified that he wrote as dictation from the accused, who, at the time, could not write because of his spinal cord injury. (T. Pp. 430-433, 622-625).

Even under the ***Frye*** test, the trial court is required to assure itself that the handwriting expert's opinion is valid to assist the jury in making a factual determination. ***Frye v. U.S.,*** 293 F. 1013 (D.C. Cir. 1923) (requiring as a prerequisite for admissibility of any scientific process "general acceptance in the particular field in which it belongs" in order to be a proper subject for testimony. 293 F at 1014.) There must be some index of validity that stands alone and separate from those who practice the expertise. The trial court failed to order the state to produce any such study. The Court

should know that none exists. Therefore, handwriting analysis is junk science and should never have been presented to the jury.

The use of even one unauthenticated writing is equivalent to a one-photo lineup. As has been demonstrated, handwriting analysis in general cannot meet the ***Frye*** standard for admissibility. Specifically, David Lybeck's admitted reliance on a document submitted to him by the prosecution as authentic but which is in fact bogus, compounds the one-photo lineup analogy.

That North Dakota courts have until now simply accepted handwriting expertise, does not justify its use in a criminal case where the prosecution can present no study by any reputable authority to verify the existence of such expertise.

The questioned document, written in what purports to be a version of the Spanish language was not found in the accused's possession, there is no witness who saw him write it, it was unsigned, and the means by which it came into the hands of the prosecutor are suspect.

The defense maintains that handwriting expertise is no more reliable than polygraph evidence, which is uniformly rejected by courts nationwide.

At a minimum, the trial court should have required a blind test of handwriting analysis before Mr. Lybeck was permitted to render an opinion.

A helpful University of Pennsylvania Law Review article sets out in detail the fallaciousness of handwriting analysis. The law review article is in Appellant's Appendix Pp. 36-88). The commentators who authored the article surveyed the known scientific literature concerning so-called handwriting experts, and essentially found that there is no scientific basis involved.

Furthermore, handwriting analysis has no accepted forensic science basis. Handwriting analysis has been likened to witchcraft. Other defects in the state's presentation of Lybeck as an expert include:

The writing is in Spanish. Lybeck does not read, write, or understand Spanish.

The writing came into the possession of Jennifer Haroldson, mother of the alleged victim in this case, by mysterious means. It had no postage, address, envelope, return address, or signature.

Further, there are serious questions about the authenticity of so-called known writings relied on by David Lybeck the state's handwriting expert.

The trial court permitted the prosecution to establish that the so called known samples of Mr. Hernandez's writing were in fact known, authenticated samples of Hernandez's writing. The trial judge committed error in admitting the samples as "known" handwriting of Hernandez

because no one saw him write them.

For example, Deputy Sheriff Laurie Ward, who is assigned to the Cass County Jail, testified in a pretrial hearing and again at the trial that she in fact wrote "K-1", an Inmate Request Form. However, the state presented exhibit "K-1" as a known sample of Hernandez's handwriting. Deputy Ward also testified at the trial. (T. Pp. 430-433).

The state cannot have it both ways. The defense demonstrated that "K-1" was not a known sample of Hernandez's handwriting, but the trial court erroneously permitted the state to proceed as if it were.

Similarly, other materials relied on by the state's so-called expert, were written by other Cass County Jail inmates, acting as scribes for Mr. Hernandez. The man who wrote most of the so-called known samples of handwriting attributed to Hernandez was Kelly Barfield. (T. Pp. 622-625). Hernandez, whose neurological condition stemming from a spinal cord injury, was without the use of his right hand for writing, grasping, or any other fine motor skill. (T. Pp. 700-703, 710). Furthermore, he is right handed and has never learned to use his left hand to write.

Because State's Exhibit 9 contains what the state considers admissions by the accused, the defense asserts that Mr. Lybeck's examination was faulty at a minimum and should have been excluded from

the evidence.

So called expert Lybeck's answer when cross examined was to eliminate some of the challenged documents from his "expert" consideration. Yet Lybeck's hired gun opinion was the same: Hernandez wrote the questioned document. The state failed to authenticate the document with even a rudimentary search for Hernandez's fingerprints.

Even if handwriting analysis expertise were accepted under ***Daubert*** and ***Kumho Tire***, the defense contends that Mr. Lybeck relied on ghost written materials to form his conclusion that Mr. Hernandez wrote "without a doubt" the letter in Spanish, State's Exhibit 9. (T. Pp. 505-507).

The defense demonstrated that Lybeck's methodology in using ghost written materials to form his "expert" opinion was not based on accepted science. (T. Pp. 447-453). Thus, the trial judge erred by failing to exclude any testimony by Lybeck under the Rules of Evidence and principles of fundamental fairness. The trial court simply approved the use of ghost written materials, overlooking that Lybeck nullified his own opinion in doing so and should not have been permitted to testify as an expert or even as a person with knowledge in the language of Rule 702.

While this Court has not required ***Daubert***-type hearings, the instant case is an opportunity for the Court to require the fundamentally fair gate

keeping function announced a decade ago by the Supreme Court of the United States.

The principal provision governing the admissibility of expert testimony in state and federal court is Rule 702 of the Rules of Evidence. With that evidentiary rule in mind, the Supreme Court said in ***Daubert,***

> "[I]n order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation - i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." (509 U.S. at 590)

Six years later the Supreme Court decided that trial courts were to be the gatekeepers for admitting or excluding expert testimony based on whether the testimony has a reliable basis. ***See Kumho Tire Co. v. Carmichael,*** 526 U.S. 137 (1999).

A trial court's gate keeping function must apply to scientific and non-scientific testimony. Either way, the state's so-called handwriting comparison expert should have been kept from testifying because the testimony, despite conventional wisdom, involves no valid expertise by any measure. This error created a default in favor of the prosecution that was unfairly prejudicial to the accused.

It is fundamental that all state courts are bound by decisions of the Supreme Court of the United States through the supremacy clause of the Constitution. In the instant case, the trial court erred in failing to hold a requested ***Daubert*** hearing.

Consequently, the accused was unfairly prejudiced by the testimony of David Lybeck's ersatz expertise. The only alternative to these and other errors, in fundamental fairness to the accused, is to grant a new trial.

IV. The trial court erred prejudicially when she permitted the state to present evidence that could not be tested or challenged because the evidence sample was destroyed before it could be analyzed by the defense as potentially exculpatory evidence.

The state permitted the destruction of potentially exculpatory evidence. As a result, the trial court erred and the defendant was unfairly prejudiced by the introduction of evidence that "debris" collected from the alleged victim was not included in the sexual assault kit for evaluation and testing by the state crime lab. The "debris" allegedly contained non-motile sperm. Because the lab at MeritCare Clinic did no DNA analysis, then destroyed the sample, the implication for the jury was that the non-motile sperm was connected with the accused, which is inflammatory and unfairly prejudicial. (T. Pp. 319-321). Without DNA analysis the non-motile sperm evidence should have been excluded under Rule 403 of the NDRE as

unfairly prejudicial, confusing and misleading to the jury.

Further, the destruction of the "non-motile sperm" sample violated Hernandez's right to due process of law. ***See California v. Trombetta***, 467 U.S. 479 (1984). The Court in ***Trombetta*** established three elements to prove a due process violation: 1. a reasonable person should have known that the evidence was exculpatory before the evidence was destroyed; 2. there are no reasonably available means to obtain a substantially similar sample, and 3. that the destruction of the evidence was done in bad faith, and negligence alone does not give rise to a finding of bad faith.

The destruction of the "debris" sample of non-motile sperm forever prevented the sample from being tested further. The physician and SANE nurse are educated and have been schooled in the proper collection of evidence samples for the Sexual Assault Kit. They are by definition reasonable persons. While they are not trained to know what is or is not exculpatory, the physician and SANE nurse purposely subverted the protocol of the sexual assault kit by not including the "debris" material for crime lab analysis.

As a consequence, the State's Attorney's Office, which is supposed to be well versed in sexual abuse evidence collection, permitted the "debris" sample to be destroyed. A DNA analysis could not be performed. The state

should have preserved the sample for defense DNA testing. Potentially exculpatory evidence was thus kept from the defense by the state on its watch.

The impact of the second ***Trombetta*** element is clear because there is no reasonably available means to obtain a substantially similar sample. When MeritCare destroyed it, the sample was irretrievable.

Lastly, under ***Trombetta's*** elements, the diversion of the sample from the sexual assault kit is presumptively bad faith on the part of the state. Common sense dictates that all potential evidence be collected and sent to the state crime lab. Since no similar sample could be obtained, Hernandez is being forced to suffer the consequences.

A timely motion ***in limine*** was filed and heard on November 1, 2004, the day before the trial commenced. Among other things that motion challenged the introduction of "non-motile sperm" evidence because the sample was destroyed and the defense was foreclosed from having it analyzed. However, the trial court denied the motion ***in limine*** and permitted the state to introduce the evidence because, in the trial court's words, that was the only evidence of semen found in the case. (The transcript of the pretrial hearing was not prepared by the court reporter, although it was requested by the defense in a motion to the trial court with

Hernandez's indigency petition. Once the transcript is in hand a motion to supplement the record may be in order.)

The prejudicially unfair nature of such evidence is at least on par, if not equal, with the unfair bolstering the trial court permitted through the testimony of the physicians referred to above in Argument 1 of the brief.

Based on the conduct of the state in not preserving all of the evidence for potential analysis by the defense, Hernandez was foreclosed from any meaningful challenge concerning the source of the non-motile sperm evidence because the hospital laboratory threw out the sample. Thus, no further evaluation of the evidence was possible. The sample could have been analyzed to determine the DNA of the contributor.

Further, the SANE nurse at MeritCare and the attending physician failed to follow the sexual assault kit protocol, depriving the defense of potentially exculpatory evidence. Each witness, the SANE nurse and the attending physician testified that there is a portion of the sexual assault evidence gathering kit that is labeled "debris." "Debris" was collected from the alleged victim. Yet the "debris," which contained the non-motile sperm was diverted from the approved evidence collection mandated protocol of the state crime lab and destroyed. Cleary, both of which actions, circumventing the established evidence collection protocol for crime lab

examination and analysis of "debris" and destroying the non-motile sperm, were fundamentally unfair.

Those actions, sanctioned by the state, permitted the jury to penalize the accused by allowing the jury to speculate about the evidence.

Further it was error and an abuse of discretion for the trial judge to deny a defense motion for an order ***in limine*** to prevent the state from introducing evidence of and from referring to certain examination and testing of alleged non-motile sperm samples obtained from the person of the alleged victim, L.H..

Since the state failed to preserve the sample of the substance gathered and tested for subsequent DNA testing by the State Crime Laboratory, the state should not have been allowed to use the non-motile sperm evidence at the trial. The state orally told the defense that this test was done by MeritCare officials on their own and that the evidence was tested in MeritCare's laboratory at or prior to the time samples were collected for inclusion in the rape kit prepared for testing at the State Crime Laboratory in Bismarck. Sexual assault cases have evidence gathering protocols for a reason. The state cannot escape its responsibility in this case by blaming MeritCare's physician for free lancing. Destroying potentially exculpatory evidence obliterates notions of due process and fundamental fairness.

The results of the testing of all of the materials sent to the lab in Bismarck, for example the contents of the sexual assault kit, the victim's clothing and bed linen from the motel room all were negative for semen or sperm, either motile or non-motile. Thus, allowing any reference before the jury to the gathering and testing of the non-motile sperm allegedly found in the "debris" was so highly prejudicial as to deprive Hernandez of a fair trial.

Again the state's explanations of the destruction of the sample and that MeritCare was freelancing do not relieve the state of offering only admissible evidence. How can the sample have relevant evidentiary value, if its source is unknown? The state was permitted to let the jury speculate that the "non-motile sperm" originated with the accused. That is fundamentally unfair as well as being spurious.

But the state was permitted by the trial court to hoodwink the trial jury with the conclusion that L.H. got gonorrhea from the accused the very same day the alleged gross sexual imposition allegedly occurred. The state knew that the incubation period for gonorrhea was more than a few hours, but persisted in insinuating that the alleged victim got gonorrhea May 22, 2003. Further, non-motile sperm is no longer living and moving. There is no valid logical conclusion that the sperm became non-motile within the space of a few hours, when it is just as likely that the cells were older by

days than that, just like the gonorrhea took five or more days to incubate. This Court must not condone the error committed by the trial judge in admitting the non-motile sperm evidence. The Court must order a new trial with the "non-motile sperm" evidence excluded because it could not be linked to the accused and because it was destroyed under the aegis of the state.

V. Execution of the search warrant for bodily fluid and tissue samples from Hernandez was fatally defective.

When Hernandez was arrested on October 13, 2003, Detective James E. LeDoux of the Fargo Police Department sought a search warrant to collect body samples from the person of the Defendant and provided a sworn affidavit to the Honorable Georgia Dawson requesting the search warrant. Judge Dawson issued a search warrant directing any peace officer of the State of North Dakota to search the person of the Defendant and to seize body items described on Exhibit A to the search warrant. (See Appellate Appendix p. 27-28).

At some point in the process of serving the search warrant, Detective LeDoux learned that personnel at MeritCare Hospital would not seize body samples without a specific order authorizing them to take the body samples from the Defendant. (T. Pp. 417-418). Detective LeDoux then went back to

the States Attorney's office and attempted to obtain an order directed to MeritCare personnel. No further affidavit in support of this order was ever presented to the issuing magistrate. As a matter of fact, the issuing magistrate, Judge Dawson, was apparently unavailable and the States Attorney's office presented an unsworn motion to Judge Michael O. McGuire, along with a copy of Judge Dawson's search warrant, to obtain a supplemental order directed to MeritCare Hospital staff. Judge McGuire's order makes no reference to any sworn affidavit in support of the supplemental order.

Defendant maintains the order of Judge McGuire and the gathering of the subsequent bodily evidence from the Defendant is contrary to Rule 41 of the North Dakota Rules of Criminal Procedure subd. (c)(1), Article I, § 8 on the North Dakota Constitution, and the Fourth Amendment to the United States Constitution all of which specifically provide "No warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

Most importantly, the United States Supreme Court in ***Weeks v. United States,*** 232 U.S. 383 (1914) declared that an illegal search and seizure barred the use of such evidence in a criminal proceeding.

Without question, a search warrant to collect bodily fluids and other

physical evidence from an accused's person is proper, provided the requirements under the North Dakota Rules of Criminal Procedure, the North Dakota Constitution and the Fourth Amendment to the United States Constitution are met. Both requirements specifically refer to an affidavit needed to make the search warrant valid. In our case, the order of Judge McGuire was issued without an affidavit from the person requesting the order and was used by the Fargo Police Department to obtain the bodily samples. MeritCare personnel had refused to collect the samples and what amounted to an amended search warrant was obtained with the order of Judge McGuire.

Defendant requests this Court to find the attempt by the Fargo Police Department to correct the original search warrant and to supplement the original search warrant was improper and illegal, requiring this Court to suppress all evidence obtained as a result of the search.

A second issue arises from the fact that an officer of the Fargo Police Department, Sgt. Ross Renner, wrote the word "void" across the face of the search warrant because he understood Detective James LeDoux was going to obtain a new search warrant containing the direction to MeritCare personnel to seize the bodily samples. (See Appellate Appendix Pp. 26). Although the Court docket does not contain reference to the Police

Department's return of the search warrant, Defendant has been provided with a packet of documents by the States Attorney's office reflecting a District Court filing stamp of October 13, 2003, an eleven page document referenced at Appellant's Appendix Pp. 22-32. Interestingly enough, if this Court examines the search warrant marked "void" (Appellate Appendix p.27), it will see under the word "void" the initials "J.E.L.," obviously standing for James E. LeDoux, the officer requesting the original search warrant.

Detective LeDoux's initials also appear at page 29 of the documents and at page 32 of the documents (on the inventory and receipt filed with the documents).

Defendant can find no specific authority under North Dakota law with respect to the effect of the Officer Renner's voiding of the search warrant and Detective LeDoux's apparent endorsement of the voiding of the warrant. Suffice to say the actions of the Fargo Police officers are highly questionable and the legal effect appears to be blatantly obvious. The officers voided the search warrant in anticipation, as detective Renner indicates, obtaining a new search warrant.

The use of the bodily samples taken as a result of the search warrant was critical to establishing essential elements of the prosecution's case. The

Court should order all items taken as a result of that search warrant suppressed.

Judge McGuire's order substantially alters the search warrant in that it includes non-law enforcement personnel within the permissive persons ordered to conduct a criminal search and seizure. Rule 41 (c)(1) requires the warrant to be issued only to a peace officer, not medical personnel. That amendment to the search warrant should only have been made with an appropriate affidavit giving the Court the sworn reasons for the request. Defendant refers to ***State v. Schmitz***, 474 N.W.2d 249 (ND 1991) @ p. 253 where the Court ruled lack of specificity in the description of the property sought in the warrant can be cured by the greater detail provided in the applying officer's affidavit in support of a warrant if that affidavit is specifically referenced and incorporated in the warrant. We submit in this case the specificity of the people to whom the warrant was addressed and the reasons for the request cannot be modified merely from a application by the States Attorney's office, unsworn, particularly when the judge issuing the supplemental order was not the judge before whom the applying officer appeared to obtain the search warrant.

The warrant is fatally defective and the body samples taken from the Defendant were illegally obtained in violation of his due process rights

under both the North Dakota and the United States Constitutions. The evidence must be suppressed.

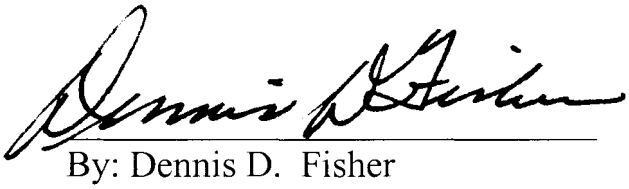
CONCLUSION

Based on the arguments presented, the totality of the errors enumerated and the totality of the circumstances in this case, the defense requests that this Court grant Luis Hernandez a new trial.

Respectfully submitted.

Dated this 22nd day of June, 2005.

STEFANSON LAW



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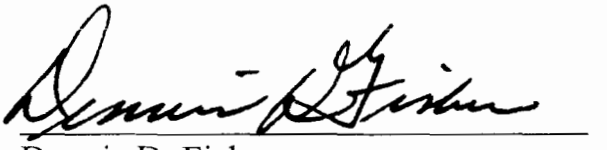
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellant complies with the type-volume limitations imposed therein. The Brief of Appellant contains 9662 words of proportionately spaced type as counted by Lotus Word Pro, the software used to prepare the brief.



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